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IN THE

Supreme Court of The United States

No.

DURELL PRODUCTS, INC.,

Petitioner,

v.

AJAX REALTY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 12, 1972.

OPINIONS BELOW

The Memorandum Opinion of the District Court for the Eastern District of Virginia granting petitioner's motion to dismiss and to quash service of process is printed in Appendix A hereto and is unreported. The opinion of the Court of Appeals, which reversed the judgment of the District Court for the Eastern District of Virginia, is printed in Appendix B and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered on December 12, 1972. A rehearing was not requested.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Virginia Long Arm Statute, § 8-81.2 of the Code of Virginia, 1950, as amended, violates the due process clause of the Fourteenth Amendment to the United States Constitution when applied to confer jurisdiction of a U.S. District Court in Virginia over a State of Washington corporation which manufactured window frames for a Colorado buyer, who after manufacture, directed the windows to be shipped to its customer in Virginia, this being the single, isolated, contact with Virginia.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the due process of law clause of the Fourteenth Amendment, United States Constitution.

The statute involved is § 8-81.2 of Title 8, Chapter 4.1, of the Code of Virginia of 1950, as amended in 1964, and is officially reported in Volume 2, Code of Virginia, 1950, 1957 Replacement Volume, 1972 Commulative Supplement, page 33. The pertinent parts of the Section are:

> § 8-81.2 When personal jurisdiction over person may be exercised.
>
> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; . . .

STATEMENT OF THE CASE

Petitioner, a corporation located in the State of Washington, and herein referred to as Durell, manufactured unglazed window frames which C&S Sales Company, a Colorado corporation, purchased and sold to Ajax Realty Corporation, hereinafter referred to as Ajax, a Virginia corporation. The window frames were ultimately incorporated in an apartment building in Norfolk, Virginia. Because the windows allegedly leaked, Ajax instituted this action against Durell and others alleging both breach of warranty and negligence. Jurisdiction of this action was based upon diversity of citizenship. 28 U.S.C.A. § 13.32.

The facts which were not disputed in the District Court are as follows: The window frames in question were manufactured by Durell at Seattle, Washington; it is a Washington corporation; and it does "almost all of its business in five western states." It

has never been domesticated in Virginia and has never had or maintained any manufacturing, sales office, storage or other business facility in Virginia. None of its officers, directors or employees have ever been in Virginia on any company business, except to investigate the damage claim asserted in this suit. It has never advertised, solicited, or contracted any sales in Virginia, and its products were not distributed in Virginia. It has never had a distributor, jobber, broker, agent or manufacturer's representative in Virginia.

Durell sold the windows in question to C&S Sales of Denver, Colorado. The transaction was handled entirely outside of Virginia, and Durell was not in any way involved in the transaction which resulted in the sale and use of the frames in Virginia. Neither C&S Sales nor any of its personnel is an agent, representative, jobber, broker or distributor for Durell.

The sale by Durell to C&S Sales was for unglazed frames and without window glass. While the frames were being manufactured, C&S Sales requested Durell to forward a sample frame to a Mr. Diamond in Chicago so that Diamond could make preparations to install glass in the frames. Thereafter, Durell was directed to ship the frames to Norfolk, Virginia. The freight was prepaid and billed to C&S Sales. Later some additional frames were shipped to replace frames damaged in transit. The frames were glazed and installed by others. Durell had no further contact with the frames until advised of the alleged defects, at which time it offered its assistance in attempting to alleviate the problem.

Durell's price to C&S Sales Corporation was approximately $37,000.00. Durell was a non-resident of Virginia. Process for it was served on the Secretary of the Commonwealth of Virginia, pursuant to the provisions of the Long Arm Statute. Durell moved to dismiss the action or quash the return of service of summons. The District Court found that no part of the Long Arm Statute was applicable to Durell and, therefore, the motion to dismiss was granted, service of process on Durell was quashed

and it was dismissed as a party defendant. In his Memorandum Order, the District Judge found as follows:

> "Durell does not *regularly* do or solicit business in Virginia, or engage in other *persistent* course of conduct, or derive substantial revenues from goods used or consumed or services rendered *in this State*." (Appendix (A, p. 7).

The Fourth Circuit Court of Appeals reversed the District Court, finding that the $37,000.00 which Durell derived from Ajax's use of the frames in Virginia constituted "substantial revenue," under § 8-81.2 (a)(5) and further that the application of § (a)(5) to Durell does not violate the due process clause of the Fourteenth Amendment. The Order of the District Court dismissing Durell and services of process was reversed, and the cause remanded to the District Court for further proceedings not inconsistent with the Opinion.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court. Further, this Court should grant *certiorari* to settle the question of to what extent should the trend toward removing all restrictions on the personal jurisdiction of state courts over foreign corporations be permitted to continue.

Now accepted universally as a fundamental premise, the doctrine that due process requires only that a foreign corporation have "certain minimum contacts" within the territory of the forum, so that the maintenance of the action does not offend traditional notions of fair play and substantial justice, was set forth by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). It was subsequently applied in the case of *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), and the last major application was made in the case

of *Hanson* v. *Denckla*, 357 U.S. 235, 251, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958).

In *Hanson, supra*, this Court noted that the requirements for personal jurisdiction over nonresidents had changed considerably since "the rigid rule of *Pennoyer* v. *Neff*" because of "progress in communications and transportation," but qualified this by stating:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdictions of the state courts. Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective states." 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296.

The Court was careful to insist "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253, 78 S. Ct. at 1240, 2 L. Ed. 2d at 1298.

Since *Hanson, supra*, there has been much divergence of judicial opinions in the application of the "minimum contacts" doctrine and where the line of limitation falls continues to be a subject of prolific controversy. The majority of cases still hold that jurisdiction cannot be constitutionally based upon an out-of-state contract when the defendant has performed no acts whatsoever within the state. However, there is a discernible trend which is broadening the doctrine further than was intended by either *McGee, supra*, or *Hanson, supra*, and perhaps it is best exemplified by the case of *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). In *Gray*, an Illinois plaintiff sued an Ohio manufacturer of a safety valve which had been sold to a Pennsylvania corporation for installation in a hot water heater, which was then sold to a consumer in Illinois. The hot water heater in question had exploded in Illinois injuring the plaintiff, allegedly

as a result of a defect in the safety valve, and jurisdiction was sought over the valve manufacturer in spite of the fact that its only contact with Illinois was the sale of the single valve to the Pennsylvania hot water heater manufacturer. The Court found that the "minimum contacts" requirement had been satisfied because "at the present time, it is sufficient if the act or transaction itself has a substantial connection with the State of the forum." 22 Ill. at 438, 176 N.E. 2d at 764.

Perhaps one of the best known cases applying and interpreting the doctrine in *International Shoe*, *supra*, was decided by the Fourth Circuit in 1956. In *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F. 2d 502 (4th Cir. 1956), the plaintiff attempted to obtain jurisdiction in North Carolina over a New York manufacturer who had shipped synthetic fibre F.O.B. to the plaintiff's factory in North Carolina. Plaintiff had placed the order following a visit by its representative to the defendant's plant in New York, and the defendant's only in-state activity was a trip by its general manager to North Carolina to discuss Erlanger's complaint that the yarn was defective. The Court found that there were insufficient "minimum contacts" to sustain jurisdiction under the North Carolina "long arm" statute and in responding to plaintiff's claim that the size of the monetary interest involved ($17,000.00) supplied the minimum contact required, the Court said at p. 507:

> "The Supreme Court has said that the quality and nature of the activity must be considered and it may be conceded that in some circumstances the sum involved may also be pertinent; yet the bounds of due process cannot be staked out in financial niceties in order to sanction jurisdiction not otherwise justifiable."

The case of *Beaty* v. *M.S. Steel Co.*, 276 F. Supp. 259, also rejects the decision laid down in *Gray*, *supra*. In Beaty, bar joists were manufactured in Alabama, pursuant to a contract entered into in Massachusetts, and shipped into Maryland where one collapsed while being installed at the job site in Maryland.

The Court at p. 263 stated the following:

> "Furthermore, although the precise question has not as yet been presented to the state or Federal courts in Maryland, this Court concludes that the *Gray* case would not be followed by the Maryland Court of Appeals. It would offend traditional notions of fair play and substantial justice to hold that a nonresident corporation could be sued in Maryland merely because on one occasion its product manufactured in another state was shipped into and used within this state. As the Supreme Court said in Hanson v. Denckla, 357 U.S. 235 (1958) at page 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283:
>
> > 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'."

Opinions in the following cases not only indicate that there is conflict among the Circuits and States but also indicate that a slight majority of courts have held the line in accordance with the limitation enunciated in *Hanson, supra*:

Lone Star Motor Import, Inc. v. *Citroen Cars Corp.*, 185 F. Supp. 488 (S.D. Texas 1960), rev'd. on other grounds, 288 F. 2d 69 (5th Cir. 1961).

Allied Fin. Co. v. *Prosser*, 103 Ga. App. 538, 119 S.E. 2d 813 (1961).

Tyee Constr. Co. v. *Dulien Steel Products, Inc.*, 62 Wash. 2d 106, 381 P. 2d 245 (1963).

Perlmutter v. *Standard Roofing & Tinsmith Supply Co.*, 43 Mics. 2d 885, 252 N.Y. S 2d 583 (S. Ct. 1964).

Byham v. *National Cibo House Corp.*, 265 N.C. 50, 143 S.E. 2d 225 (1965).

Kourkene v. *American BBR, Inc.*, 313 F. 2d 769 (9th Cir. 1963).

In the present case, it is acknowledged that the only contact that the petitioner had with Virginia was a "solitary and fleeting contact," viz., its shipment to Virginia of window frames sold to a Colorado firm. (App. B, p. 7b). The Court of Appeals also acknowledged that "It is problematical whether Durell realistically is in a position to invoke the benefit of the laws of Virginia." (App. B, p. 7b). But, notwithstanding, the Court follows by stating, "But the day is long past when the 'minimal contact' necessary to satisfy due process is to be equated with the traditional concept of doing business." (App. B, p. 8b).

The requirement that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, is not tantamount to the traditional concept of doing business. The "doing business" concept most certainly would require more, but the doctrine as developed in the triology of *International Shoe*, *supra*, *McGee*, *supra*, and *Hanson*, *supra*, makes it essential that in each case there must be at the very least some type of act such as heretofore described.

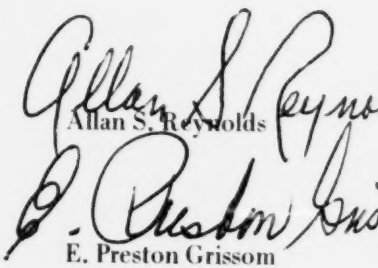
The amount involved standing alone, therefore should not constitute sufficient criteria for determining "minimum contacts." It is conceivable that the amount might be pertinent in a case involving a contact or activity other than an isolated shipment. For example, if a defendant shipped items having a value of $10.00 each into a state over a period of time, then the aggregate worth of the items shipped would be indicative of a significant number of contacts. Or, if a defendant shipped one

item of substantial value into a state pursuant to a contract entered into with a resident of that state, then the value may be pertinent. There is no such other act, contact or activity in the case at bar.

The petitioner recognizes that what amounts to due process regarding the application of "long arm" statutes is certainly not static, and our advancing methods of transportation and communication should be considered in reaching the proper level of restraint. However, to subject a defendant to a suit in a state where it has never solicited, advertised, or transacted business and where its only contact is shipping goods following completion of its obligations under a contract entered into and totally performed in another state on behalf of its customer who is not a consumer in that state, offends due process. It places a hardship on every manufacturer of goods regardless of its relationship with the state in which such goods may finally come to rest.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.



Allan S. Reynolds

E. Preston Grissom

Counsel for Petitioner

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA,

CITY OF NORFOLK, to-wit:

We, E. Preston Grissom and Allan S. Reynolds, attorneys of record for Durell Products, Inc., petitioner herein, depose and say that on the day of March, 1973, we served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on Ajax Products, Inc., respondent herein, by delivering the same to Maurice Steingold and J. Cameron Mann, counsel of record for the said respondent, at their offices located at 819 Citizens Bank Building, Norfolk, Virginia 23514.

E. Preston Grissom

Allan S. Reynolds

Subscribed and sworn to before me, at Norfolk, Virginia, this 9th day of March, 1973.

Notary Public

My Commission expires:

5-3-75

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

AJAX REALTY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	CIVIL
v.	)	ACTION
	)	NO. 6881-N
J. F. ZOOK, INC., et als,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Plaintiff instituted this action against numerous defendants, among them Durell Products, Incorporated (Durell), for alleged breach of implied warranties relative to the sale of aluminum window frames. Durell filed a motion to dismiss or quash the service of process as to it. In support of the motion it attached an affidavit of its President. Plaintiff filed an affidavit of its Vice-President. No other evidence is offered in favor of or in opposition to the motion.

Plaintiff states in its brief in opposition to the motion that it "accepts as factual the facts recited under Durell's portion of its memorandum entitled 'The Nature of the Action'."

The window frames in question were manufactured by Durell at Seattle, Washington; it is a Washington Corporation; and it does "almost all of its business in five western states." It has never been domesticated in Virginia and has never had or maintained any manufacturing, sales office, storage or other business facility in Virginia. None of its officers, directors or employees have ever been in Virginia on any company business,

except to investigate the damage claim asserted in this suit. It has never advertised, solicited, or contracted any sales in Virginia, and its products are not distributed in Virginia. It has never had a distributor, jobber, broker, agent or manufacturer's representative in Virginia.

Durell sold the windows in question to C&S Sales of Denver, Colorado. The transaction was handled entirely outside of Virginia, and Durell was not in any way involved in the transaction which resulted in the sale and use of the frames in Virginia. Neither C&S Sales nor any of its personnel is an agent, representative, jobber, broker or distributor for Durell.

The sale by Durell to C&S Sales was for unglazed frames and without window glass. While the frames were being manufactured C&S Sales requested Durell to forward a sample frame to a Mr. Diamond in Chicago so that Diamond could make preparations to install glass in the frames. Thereafter Durell was directed to ship the frames to Norfolk, Virginia. The freight was prepaid and billed to C&S Sales. Later some additional frames were shipped to replace frames damaged in transit. The frames were glazed and installed by others. Durell had no further contact with the frames until advised of the alleged defects, at which time it offered its assistance in attempting to alleviate the problem.

Durell has no contract to supply or furnish services in Virginia, is not engaged in any course of conduct in Virginia, nor does it derive "substantial revenues" for services performed in Virginia. It appears the only time it had an employee or representative in Virginia was when its representative came to Virginia to see if assistance could be given to alleviate the leaking condition complained of by plaintiff.

Durell is alleged to be a non-resident of Virginia, and it is. Process for it was served on the Secretary of the Commonwealth of Virginia, pursuant to the provisions of the Long Arm Statute. This defendant moves to dismiss the action or quash the return of service of summons.

The burden of pleading and when challenged of supporting jurisdictional facts by competent and preponderant proof is upon the plaintiff. *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178, 182, 189; *Kvos, Inc.* v. *Associated Press*, 299 U.S. 269, 278; *Bowman* v. *White*, 388 F.2d 756, 760 (4th Cir. 1968); *Hedberg* v. *St. Farm Mutual*, 350 F.2d 924, 929 (8th Cir. 1965). The complaint must state on its face the grounds for the Court's jurisdiction. Federal Rules of Civil Procedure, Rule 8(a)(2). *Bowman* v. *White*, supra, *Gold-Washing and Water Co.* v. *Keyes*, 96 U.S. 199; *Ivey* v. *Frost*, 346 F.2d 115 (8th Cir. 1965).

To exercise jurisdiction over Durell, an out-of-state defendant, on the facts of this case, plaintiff must point to some United States statute, Virginia statute or rule of court authorizing such assertion of jurisdiction. There is no such United States statute. Hence, we turn to the Long Arm Statute of Virginia, Title 8, Chapter 4.1 of the Code of Virginia 1950, as amended in 1964, the pertinent section being 8-81.2. That Chapter provides that whenever "person" is used in the Chapter, it shall include "corporation, etc." The pertinent parts of the Section are:

> § 8-81.2 When personal jurisdiction over person may be exercised.
>
> (a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's
>
> (1) Transacting any business in this State;
>
> (2) Contracting to supply services or things in this State;
>
> (3) Causing tortious injury by an act or omission in this State;
>
> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services

rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; - - -.

Sub-paragraphs (a)(6) and (7) of said Section deal with real property in this State, and contracts of insurance. Sub-paragraph (b) provides that whenever "jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted." Such is the case here.

Applying the facts as determined from the record, it is clear Durell transacts no business in Virginia. It has no office here, is not licensed to do business here, and has no employees, agents or officers here. It has not entered into any contract to do business, sell or furnish materials, services or things in Virginia. It has no customers or contacts in Virginia. It does not manufacture, fabricate, buy, sell or otherwise deal in merchandise in Virginia. If one contends that when a representative of Durell came into Virginia to inspect the window frames and to assist in alleviating the leaking windows, and this single act brought Durell within the provisions of the statute of transacting business in the State, is to go far beyond any previous holding of our courts and statutes like the one here. It is difficult to believe that the courts could hold such a single act as constituting transacting business.

What Judge Sobeloff said in *Erlanger Mills* v. *Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956) is particularly pertinent, namely:

> ---We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure.
>
> Furthermore, to sustain jurisdiction here would not only be offensive to the due process clause, but it would involve the danger of grave burdens and impediments to interstate commerce, if the door should be opened to similar legislation by other States. Davis v. Farmers' Cooperative Equity Co., supra; Atchison, T. & S.F.R. Co. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 68 L.Ed. 928; cf. Denver & Rio Grande Western Railroad Co. v. Terte, 284 U.S. 284, 52 S.Ct. 152, 76 L.Ed. 295; and International Milling Co. v. Columbia Transportation Co., 292 U.S. 511, 54 S.Ct. 797, 78 L.Ed. 1396.

See also *Beaty* v. *M.S. Steel Co., Inc.*, 401 F.2d 157 (4th Cir. 1968).

The cause of action did not arise from sending the person to Virginia to make an inspection. The accident had already occurred. Here there was no acting "as to a cause of action arising from the person's transacting any business in this State." Code of Virginia, 8-81.2.

Durell's operations are conducted outside of Virginia. It has made no contract in Virginia or to be performed in Virginia, nor has it contracted to perform services or supply things in Virginia. The evidence does not bring this case within the provisions of Section 8-81.2(a)(2).

Under 8-81.2(a)(3), jurisdiction can only be obtained over one "causing tortious injury by an act or omission in this State." Applying the evidence before the Court, which is set out above, the causing of tortious injury "by an act or omission in

this State" is not shown. If an act or omission occurred, it was at Seattle. The evidence does not even suggest it occurred in Virginia.

Sub-paragraph (a)(4) [8-81.2(a)(4)] provides for jurisdiction as to a cause of action arising from the person's "Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenues from goods used or consumed or services rendered, in this State." The occurrence of the injury in Virginia, and the occurrence of the act or omission out of Virginia does not complete the jurisdictional requirement. The person over whom jurisdiction is sought must be one who *regularly does or solicits business*, or engages in some other *persistent course of conduct*, or derives substantial revenues from *goods used or consumed* or *services rendered, in this State*. It means substantial. *Erlanger Mills* v. *Cohoes Fibre Mills*, supra. As pointed out above, Durell does not solicit any business in Virginia, it renders no services in Virginia, it engages in no persistent course of conduct in Virginia. There is no evidence it derives substandial revenues from goods used or consumed in Virginia. It would be pure speculation to say that it does.

Lastly, sub-section (a)(5) [8-81.2(a)(5)] provides for service on one "Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State." To come within the provisions of this sub-section there must be a breach of warranty "in the *sale of goods*;" secondly, it must be one who "*also* regularly does or solicits business or engages in other persistent course of conduct, or derives substantial revenues

from *goods* used or consumed or services rendered *in this State*." Durell does not *regularly* do or solicit business in Virginia, or engage in other *persistent* course of conduct, or derive substantial revenues from goods used or consumed or services rendered *in this State*.

The motion to dismiss is therefore granted and service of process on Durell is quashed and it is dismissed as a party defendant.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
May 1st, 1969.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-2145

Ajax Realty Corporation,

Appellant,

v.

J. F. Zook, Inc.: Midwest Redevelopment Corporation: The Royal Mace Company, a co-partnership composed of J. F. Zook, Inc. and Midwest Redevelopment Corporation; Max Ratner: Durell Products, Inc.; Joe Costa and Julius Immordina, co-partners trading as C & S Sales Company; and C & S Sales Company, Incorporated,

Appellees.

**Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Walter E. Hoffman, Chief Judge.**

(Argued October 2, 1972 Decided December 12, 1972.)

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

J. Cameron Mann (Maurice Steingold and Steingold, Steingold and Friedman on brief) for Appellant; E. Preston Grissom (Allan S. Reynolds and White, Reynolds, Smith and Winters on brief) for Appellees.

WINTER, Circuit Judge:

Plaintiff, Ajax Realty Corporation (Ajax), appeals from the district court's decision granting the motion of defendant, Durell Products, Inc. (Durell), to dismiss and to quash service of process. The appeal raises questions concerning the interpretation and constitutionality of Virginia's Long Arm Statute.[1] Va. Code Ann. § 8-81.2 (1964).[2]

Durell, a corporation of the State of Washington, manufactured unglazed window frames which C&S Sales Company, a Colorado corporation, purchased and sold to Ajax, a Virginia corporation. Ajax installed the frames in its apartment complex in Virginia. The frames leaked, occasioning property damage to the apartments. Ajax and Durell and others alleging both breach

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1. The district court applied the Virginia statute in determining whether it had acquired in personam jurisdiction. F.R.Civ.P. 4(e).

2. § 8-81.2 When personal jurisdiction over person may be exercised.

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; - - -.

See generally Note, The Virginia "Long Arm Statute," 51 VA. L. REV. 719 (1965).

of warranty and tort liability. Jurisdiction of the subject matter was based on diversity of citizenship. 28 U.S.C.A. § 1332.

With regard to the jurisdictional issue, the district court found the following facts: Durell transacts nearly all its business in the Pacific Northwest. It has never been domesticated in Virginia. Durell has never maintained any manufacturing, sales, storage, or other business facility in Virginia. It has never advertised, solicited, or contracted for any sales in Virginia. It has never directly distributed its products in Virginia. It has never maintained a distributor, jobber, agent, or other representative in Virginia.

Durell manufactured the frames in issue in Washington. It sold the frames to C&S Sales in Denver, Colorado for $37,000. C&S Sales then sold the frames to Ajax in Virginia. Durell was not involved in the sale by C&S to Ajax. C&S is not Durell's agent. At the request of C&S, Durell shipped a sample frame to Chicago to facilitate preparations for glazing. Again at the request of C&S, Durell shipped the manufactured, but unglazed, frames directly to Ajax in Virginia. After the frames leaked, Durell sent a representative to Virginia to examine them in an attempt to alleviate the problem.

I.

Ajax invokes several sections of the long arm statute. We shall discuss only §§ 8-81.2(a)(1) and 8-81.2(a)(5).[3]

1. Sec. 8-81.2(a)(1) provides that a court may exercise personal jurisdiction if the claim arises from a corporation's "transacting any business in this State." At issue is whether § 8-81.2(a)(1) should be construed to embrace Durell's sole act of

3. Sec. 8-81.2(a)(5) addresses injury arising from a breach of warranty in the sale of goods outside Virginia. Sec. 8-81.2(a)(4) addresses tortious injury arising from an act or omission outside Virginia. There is a certain ambivalence in plaintiff's position as to whether it is asserting a tort claim or a warranty claim. We shall treat it as the latter.

shipping the frames to Virginia. In Haynes v. James H. Carr, 427 F.2d 700, 704, cert. den. 400 U.S. 942 (1970), we held that § (a)(1) was not a single act statute. In other words, a foreign corporation must conduct more than a single business transaction in Virginia to be subject to jurisdiction under the provisions of that statute.

However, in John G. Kolbe v. Chromodern Chair Co., 211 Va. 736, 180 S.E. 2d 664, 668 (1971), the Supreme Court of Virginia, stressing the word "any," construed § (a)(1) as "a single act statute requiring only one transaction in Virginia to confer jurisdiction." The Court reasoned that: (1) "the purpose of Virginia's long arm statute is to assert jurisdiction over non-residents who engage in some purposeful activity in this State to the extent permissible under the due process clause;" (2) since it would not offend traditional due process notions of fair play and substantial justice to subject a foreign corporation to Virginia jurisidiction where its one business transaction "invoked the benefits and protection of the laws of" Virginia, § (a)(1) should be construed to reach such a case.

Chromodern is technically distinguishable from the instant case. The foreign corporation there had significantly stronger contacts with Virginia than did Durell: the foreign corporation there maintained a manufacturer's representative for Virginia and neighboring states, it maintained a non-stocking dealer in Virginia, it had contracted for other sales through these agents in Virginia, and the contract in question was with the Virginia non-stocking dealer. Thus, *Chromodern* does not compel a similar conclusion here. Moreover, the Court's construction of § (a)(1) as a single act statute must properly be termed dictum. Nevertheless, mindful of our obligation under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny to follow state interpretation of state law, we adopt the Virginia Supreme Court's construction of § (a)(1) as a single act statute. *Haynes*, supra, insofar as it is inconsistent, is superseded by state decisional law and should no longer be followed.

Even under the state construction of § (a)(1), however,

Durell cannot be said to have transacted any business in Virginia. Durell's sole contact with Virginia was its shipment of the frames to Virginia. FOB Washington State. Durell shipped the frames to Virginia either as an accommodation to C&S or as C&S's agent for the purpose of shipment. C&S prepaid the cost of shipment. As the district court found, Durell sold the frames to C&S, a Colorado firm. It had no initial involvement in C&S's resale to Ajax in Virginia. There is no evidence that Durell knew at the time of its sale to C&S that C&S would resell the frames to a Virginia concern, or that C&S would request Durell to ship them directly to Virginia. On the other hand, since C&S's business apparently involved the resale of manufactured frames—that is, C&S did not purchase frames for installation in its own facilities—it is not unreasonable to assume that Durell knew that C&S would resell them somewhere.

If Durell had, as originally planned, simply shipped the frames to C&S in Colorado, Virginia could not assert jurisdiction even under a single act statute. To rule otherwise would be to hold that a manufacturer transacts business in every state in which each of its independent distributors deals. Therefore, if Virginia can assert jurisdiction here under § (a)(1), the rule of the case would be that where a non-resident manufacturer ships its products directly to the ultimate purchaser, rather than to a non-resident independent distributor, either as an accommodation to the distributor or as its agent for purposes of shipment, then it has transacted business in Virginia. The Virginia Supreme Court has not gone so far in construing § (a)(1), see *Chromodern*, supra, and therefore we choose not to, especially since there is another basis for asserting jurisdiction.[4]

4. "The cases seem unanimous in holding, wehther as a matter of statutory interpretation or of due process, that the shipment of goods into a state, without more, does not constitute transaction of any business. Nor was the shipment of goods plus merely 'incidental activity' such as billing or negotiating thereafter in the state concerning defects in the goods held to be transaction of business in one case." 51 VA. L. REV., supra at 737. See Erlanger Mills v. Cohoes Fibre Mills, 239 F.2d 502 (4 Cir. 1956).

2. Sec. 8-81.2(a)(5) provides that a court may exercise personal jurisdiction if the claim arises from the corporation's "causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State, when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State." After C&S requested Durell to ship the frames to Virginia, Durell possessed a firm expectation that the frames would be used in Virginia. Although Durell did not regularly do or solicit business, or pursue a persistent course of conduct, in Virginia, we consider that the $37,000 which it derived from Ajax's use of the frames in Virginia constitutes "substantial revenue." *See* Jackson v. National Linen Service, 248 F.Supp. 962 (W.D. Va. 1965).

Durell stresses that the $37,000 contract price represents only one-half of one percent of its total sales. Although percentage of total sales may be a factor to be considered, it cannot be dispositive, for a small percentage of the sales of a corporate giant may indeed prove substantial in an absolute sense.[5] On the other hand, it is difficult to identify an absolute amount which *ipso facto* must be deemed "substantial." In *Jackson*, supra, the court held that a foreign corporation which had $25,000 in direct sales in Virginia, and an undetermined sum in indirect sales, derived "substantial revenue" for purposes of § (a)(5). *Id.* at 964-65. Johnson v. Equitable Life Assur. Soc'y., 22 App. Div. 2d 138, 140, 254 N.Y.S. 2d 258, 260 (1st Dep't. 1964) (dictum), is further indicative of a trend toward liberal construction of "substantial revenue" provisions.[6] In *Johnson*, the sale of a $1,798.20 component part by one

5. Conversely, a relatively small absolute amount might be deemed "substantial" where it constitutes a significant percentage of a small corporation's total sales.

6. See 51 VA. L. REV. at 749.

non-resident to another for ultimate use in a New York skyscraper was said to satisfy the "substantial revenue" test of New York's equivalent of § 8-81.2(a)(4). Without purporting to draw a hard and fast line, we hold that Durell's $37,000 contract price constitutes sufficiently substandial revenue to subject it to Virginia's jurisdiction under § (a)(5).

This conclusion is bolstered by our further conclusion, infra, that this assertion of jurisdiction does not offend the due process clause of the fourteenth amendment. This reasoning does not put the cart before the horse, since Virginia has held that its long arm statute exercises the full extent of jurisdictional power permitted by the due process clause. *Chromodern*, supra at 667. Carmichael v. Snyder, 209 Va. 451, 456, 164 S.E. 2d 703, 707 (1968). In other words, in Virginia, if the exercise of jurisdiction is constitutional, the long arm statute contemplates it.

II.

Since we hold that Virginia may exercise jurisdiction over Durell, we must consider the constitutionality of that exercise. Due process requires only that the foreign corporation "have certain minimum contacts with [the State] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1965). McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Although the sum which Durell derived was substantial, it arose out of a rather solitary and fleeting contact with Virginia—its shipment to Virginia of frames sold to a Colorado firm.[7] Moreover, it is

7. We are aware of authority in this Circuit indicating that under some circumstances a State cannot constitutionally assert jurisdiction over a foreign corporation where that corporation's sole contact with the State is the shipment of its goods into the State. See n. 4, supra; Golden Belt Manufacturing Co. v. Janler Plastic Mold Co., 281 F. Supp., 368, 370-71 (M.D. N.C. 1967), aff'd 391 F.2d 266 (4 Cir. 1968). These cases did not address the issue in the context of a "substandial revenue" statute, although, of course, the parameters of due process remain, regardless of the terms of the statutory authority.

problematical whether Durell realistically is in a position to invoke the benefit of the laws of Virginia. Cf. *Chromodern*, supra. But the day is long past when the "minimal contact" necessary to satisfy due process is to be equated with the traditional concept of doing business. Accordingly, we conclude that Durell enjoyed a sufficient financial benefit from the use of its frames in Virginia so that it would not be unreasonable to hold that it must account in Virginia for alleged defects, at least in a case like this where the statute requires, and Durell ultimately had, a reasonable expectation that the frames would be used in Virginia. See *Jackson*, supra. Virginia is the most logical and convenient locus to try the case. See *McGee*, supra, at 223. *Cf.* Hanson v. Denckla, 357 U.S. 235 (1958). As the Supreme Court explained in *McGee*, supra, at 222-23:

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporation . . . In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent . . . At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

We therefore hold that the application of § (a)(5) to Durell on these facts does not violate the due process clause of the fourteenth amendment.[8]

The order of the district court dismissing Durell and quashing service of process as to it is reversed, and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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8. Durell does not contend that the method of service of process, as distinguished from the basis for it, violates the due process clause. Durell had adequate notice of the suit and sufficient time to prepare its defenses.

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 72-1242

DURELL PRODUCTS, INC.,

Petitioner,

v.

AJAX REALTY CORPORATION,

Respondent.

BRIEF OPPOSING
PETITION FOR WRIT OF CERTIORARI

Appellee, (hereinafter referred to as plaintiff), prays that the Petition for Writ of Certiorari herein filed by Petitioner, hereinafter referred to as defendant, be denied.

QUESTION PRESENTED

Plaintiff agrees with the question presented in defendant's petition.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Plaintiff agrees with the constitutional provision and statute involved

as set forth in defendant's petition, except that plaintiff does not agree that there is any constitutional question presented in the petition.

STATEMENT OF THE CASE

The statement of the case as presented in defendant's petition is substantially correct.

REASONS FOR NOT GRANTING THE WRIT

The "Long-Arm Statute" involved herein is Section 8-81.2 of the Code of Virginia, 1950, as amended, and is set forth on Page 2 of defendant's petition. This Virginia Statute conforms to Article One of the Uniform Interstate and International Procedure Act. A vast number of other states have enacted Long-Arm Statutes that differ substantially from the Uniform Act, and therefore it is not surprising that the decisions from the various states are lacking in uniformity. Further, there can be no question, but that there are conflicting decisions among the states even with the same or similar statutes, but it is still a state's prerogative to interpret its own laws so long as those interpretations do not offend the mandates of the Constitution. Defendant, in its petition, admits that the universal rule today is the so called "minimal contact" concept;

that is that due process requires only that a foreign corporation have certain minimal contacts within the territory of the forum. That concept was set forth very clearly in the landmark case of International Shoe Company v. Washington, 326 U.S., 310, 66 Supreme Court 154, 90 L. Ed. 95. In that case there was no similar statute, and of course it was a 1945 decision.

The doctrine enunciated in International Shoe was followed by this Court in McGee v. International Life Insurance Company, 355 U.S. 220, 78 Supreme Court 199, 2 L. Ed. 2nd 223. A California Statute came under the scrutiny of the Court, which statute subjected foreign corporations to suit in California on insurance contracts with residents of California even though they could not be served in that state. This Court had no difficulty in disposing of the alleged denial of due process, and stated "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of expanding state jurisdiction over foreign corporations and other non-residents."

Apparently defendant in its petition relies primarily on the case of Hanson v. Denckla, 357 U.S. 235, 78 Supreme Court, 228, 2 L. Ed. 2nd 1283. That case is not even remotely in point factually to the case here in question. An action was brought in a Florida Court to subject an

out-of-state trustee under the provisions of a will to the jurisdiction of the Florida Court, where the trustee under the will had absolutely no contact with the State of Florida. This Court did hold in that situation that absent some minimal contact with the forum state that there was a denial of due process. It should be pointed out however, that even under that situation and as far back as 1958 when the case was decided, Justice Black and Justice Douglas dissented, and felt that the Florida Court should be permitted to exercise jurisdiction. An excellent law review article may be found in 69 Michigan Law Review 300 where the Hanson case is rather severely criticized and numerous cases are cited where the Hanson doctrine is seriously limited. Further, in the Hanson case there was no similar statute to the one here in point.

Defendant also relies heavily on the case of Erlanger Mills v. Cohoes Fibre Mills, 239 Federal 2nd 502. In that case the plaintiff solicited the defendant concern in New York and entered into a contract whereby defendant was to supply certain products to plaintiff in North Carolina, said shipment to be F.O.B. New York. The purchase price was $17,000.00 (a far cry from the $37,000.00 involved in this case). The North Carolina Statute involved was broad and sweeping and vastly different from the Virginia Statute here in issue. The

North Carolina Statute covered virtually anything manufactured outside of the State of North Carolina and shipped into the State, directly or indirectly. The decision, therefore, in Erlanger Mills, really has no application to the facts of this case.

Next defendant relies upon the case of Beaty v. M. S. Steel Company, 276 F. Sup. 259. There, the Maryland District Court examined several Maryland cases interpreting the statute involved and came to the conclusion that the Supreme Court of the State of Maryland would not uphold jurisdiction in the Maryland Courts based on facts of that case. While the statute involved was similar to the statute with which we are now concerned, the Maryland Statute was nontheless considerably more restrictive than the Virginia Statute. The court in Beaty did, however, consider the substantial revenue provision, but the Maryland Statute differed from Section 8-81.2 (a) (4) of the Virginia Statute by limiting the substantial revenue provision to food or services. Of course the Virginia Statute contains no such limitation. It is respectfully submitted that had the Maryland Statute been as broad as the Virginia Statute, i.e., deriving substantial revenue from goods or services, then the decision would have been different.

In this case defendant Durell undertook to supply certain windows to C & S Sales Company, the windows pursuant to that contract to be shipped to Chicago for glazing. Before the windows were shipped, C & S notified defendant that the windows were to be shipped unglazed directly to the job site in Virginia. Defendant did so, and thereby became an agent for C & S in supplying the windows to the vendee of C & S. The purchase price of the windows was $37,000.00.

In Jackson v. National Linen Service Corp., 248 F. Sup. 962, the United States District Court for the Western District of Virginia stated:

> "Although $25,000.00 might seeem a small amount, when compared to Hysan's total volume of sales, the Court believes that it is substantial enough to satisfy the Virginia Long-Arm Statute. Further, it is clear that defendant was aware that its products were being sold in Virginia and so might reasonably have expected plaintiff to use and be affected by it.";

That decision construes the identical statute involved herein. If $25,000.00 is a substantial amount of revenue, then most certainly $37,000.00 is a more substantial amount.

In the case of Johnson v. Equitable Life Insurance Society, 254 New York Sup. 2nd 258, the New York Court held $1,798.20 was a substantial amount of revenue, and the statute involved, CPLR Section 302(a)(2) was identical to the Virginia Statute.

It is respectfully submitted that the defendant herein in becoming agent for C & S Sales Company, who shipped the windows, thereby contracted to supply services or things in this State, by shipping grievously defective windows into this State, caused tortious injury and derived substantial revenue from goods used or consumed in this State. Though in no way factually in point, the case of U.S. v. Montreal Trust Company, 358 F. 2 239, certiorari denied, 384 U.S. 919, 86 Supreme Court 1366, 16 L. Ed. 2nd 440, upholds the constitutionality of an identical statute.

In the trial court's memorandum order set forth in Appendix A of defendant's petition, it is implicit that the trial court did not recognize the statute here involved as a single-act statute, nor was there as of that time a Virginia decision directly in point. In a 1971 decision, however, the Supreme Court of Virginia in the case of John G. Kolbe v. Chromodern Chair Company, 211 Va. 736, 180 S.E. 2nd 664 held that the Virginia Long-Arm Statute was a single-act statute.

Another case worthy of citation is that of St. Clair v. Righter, 250 F. Sup. 148 (Western District Virginia, 1966). This case involved an action for libel and slander where letters libeling the plaintiff were written by the defendant outside Virginia, but mailed into this State. Although the District Court denied jurisdiction under the Long-Arm Statute, it nevertheless found that jurisdiction was vested in Virginia. The Court stated:

> "The assumption of jurisdiction in this case is not merely a bald exercise of power, as this Court believes that Virginia has a great interest in, and significant contact with this situation making it reasonable to assert personal jurisdiction over these defendants. Virginia as the forum State and place of injury can quite validly desire to fix the measure of protection to which each person injured within the State is entitled against his fellows and determine whether the damage was wrongfully inflicted, thus giving rise to a cause of action in tort. This interest is rendered even more substantial by the fact that the plaintiff in this case is a domiciliary of Virginia.
>
> "Moreover the Court does not believe it would be unfair to

subject the defendants to in personam jurisdiction in this case, as they purposely mailed letters into the State whose purpose, presumably, was to encourage other stockholders of Jewell Ridge Coal Corporation to join in a suit against the plaintiff. It was not merely fortuitous, then, that the injury (if there is found to be one at the trial on the merits) occurred in Virginia; rather it was a clear example of "voluntary action" taken by the defendants which was calculated to have an effect in the forum State. For an analagous case, see the conflict of laws decision of Young v. Masci, 289 U.S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933). There the defendant, a resident of New Jersey, lent his car to another and gave him permission to drive it into New York. The borrower did drive into New York and injured plaintiff, a domiciliary of that State, who brought this action in New Jersey for the injuries received. The applicable New York statute held a car owner liable for the negligence of anyone using his car on his business or with his permission, express or implied. In deciding to apply the law of New York, the Supreme Court said that the defendant had given his permission for the car to be driven into New York and therefore subjected himself to

the legal consequences imposed by that State.

"A significant contact, which has been alluded to some extent above, is the fact the under conflict of law rules, the law of Virginia could, and probably would, be applied in this case regardless of where the suit was brought. There is a general rule (if there can be said to be any 'rules' in this area of conflicts) that the law of the place of injury governs the right of action for a tort, regardless of where the act or omission takes place...

"It is possible that the law is moving more and more towards the idea that choice of law is jurisdictional, and that the fact that the law of the place is applicable provides the minimum contact necessary to permit this State to exercise in personam jurisdiction under the due process clause of the 14th Amendment. (Emphasis supplied.) See comment 19 Wash. & Lee Law Review, 271, (1962). However, this Court would not have to go that far to assume jurisdiction in this case, since subjecting these defendants to in personam jurisdiction would be constitutionally no more obnoxious than asserting jurisdiction under a single act

long arm statute, and from the indications already discussed, this Court has little doubt that the Supreme Court will ultimately hold such statutes constitutional.

"For the reasons stated above, the defendant's motion to dismiss for lack of personal jurisdiction will be overruled."

CONCLUSION

It is respectfully submitted, therefore, that the Petition for Writ of Certiorari is without merit and should be denied.

Israel Steingold

J. Cameron Mann,
Counsel for Plaintiff

AFFIDAVIT OF SERVICE

STATE OF VIRGINIA,

City of Norfolk, to-wit:

We, Israel Steingold and J. Cameron Mann, Attorneys of record for Ajax

Realty Corporation, Appellee herein, depose and say that on the 6th day of April, 1973, we served a copy of the foregoing brief on Durell Products, Inc., Petitioner herein, by delivering the same to Allan S. Reynolds and E. Preston Grissom, Counsel of record for the said petitioner, at their offices located at 906 One Plaza East, Norfolk, Virginia 23510.

Israel Steingold

J. Cameron Mann

Subscribed and sworn to before me at Norfolk, Virginia, this 6th day of April, 1973.

Charlotte Wright
Notary Public

My commission expires May 31, 1976.